IN THE COURT OF APPEALS OF THE STATE OF ALASKA

DEAN MICHAEL RANSTEAD, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11805 Trial Court No. 4FA-11-2590 CR MEMORANDUM OPINION No. 6330 — May 18, 2016

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Michael P. McConahy, Judge.

Appearances: Michael A. Stepovich, Stepovich & Vacura Law Office, Fairbanks, for the Appellant. Earl Peterson, Assistant District Attorney, Fairbanks, and Craig W. Richards, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge SUDDOCK.

Dean Michael Ranstead pled guilty to second-degree sexual assault[1] after he sexually penetrated S.G. while she was incapacitated due to intoxication. Superior

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

[1] AS 11.41.420(a)(3).

Court Judge Michael P. McConahy sentenced Ranstead to 14 years' imprisonment with 8 years suspended, and 10 years' probation. On appeal, Ranstead argues that the judge erred when he rejected Ranstead's proposed mitigator (least serious conduct).[2] He also appeals the judge's denial of his request to refer the case to the three-judge sentencing panel based on exceptional prospects for rehabilitation. We find the judge did not err in rejecting these claims. We also reject Ranstead's claim that his sentence is excessive.

Ranstead also challenges several of his probation conditions as either unconstitutionally vague or not demonstrably related to his offense, his rehabilitation, or the protection of the public. For the reasons explained below, we affirm one of Ranstead's probation conditions, vacate several of the probation requirements, and remand the remaining conditions for further proceedings.

Background facts

On May 28, 2011, Ranstead, age thirty-four, attended a party at the Fairbanks home of a friend. Also at the party was S.G., a twenty-one-year-old woman. Ranstead and S.G. did not know each other; S.G. was a friend of the party's host. Over the course of the night, S.G. and her friends conversed, listened to music, and consumed alcohol. At around 2:30 a.m., S.G. went downstairs to sleep, fully clothed, in the bed of the party's host.

At approximately 8:00 a.m., S.G. awoke naked to a man performing oral sex on her. S.G. initially assumed the man was a friend of hers, but she discovered it was Ranstead when he repositioned himself to have intercourse with her. She immediately extricated herself and exited the room.

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[2] AS 12.55.155(d)(9).

A few days later, S.G. agreed with the Fairbanks police to surreptitiously record a conversation with Ranstead. During the conversation, Ranstead first claimed that he "did not really know what happened," but eventually he admitted to having intercourse and oral sex with S.G. while she was incapacitated.

Ranstead subsequently agreed to meet with Alaska State Trooper Joshua Trigg. During the meeting, Ranstead admitted that he had engaged in oral sex with S.G., then vaginal intercourse followed by repeat oral sex. He also acknowledged that S.G. was too incapacitated to consent and that she was unaware of what was happening.

Ranstead was indicted on one count of first-degree sexual assault and two counts of second-degree sexual assault.[3] Pursuant to a plea agreement, he pled guilty to one count of second-degree sexual assault (for sexual penetration of an incapacitated person) in exchange for dismissal of the other two counts and open sentencing.

The presentence report author interviewed Ranstead and opined that his rehabilitation prospects were "hopeful" so long as he remained sober. The report's author noted that Ranstead had apparently maintained sobriety during his pretrial release on bail (a twenty-month period). The report recommended a variety of probation conditions.

Prior to sentencing, psychologist Dr. Bruce Smith evaluated Ranstead. According to Dr. Smith's report, Ranstead was a situational offender rather than a predator, with a "quite low" risk of recidivism — in the bottom third of all sex offenders — if he remained sober. But Dr. Smith noted that Ranstead did not accept full responsibility for the offense: Ranstead declared that S.G. was "loose" and that she had "led him on."

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[3] AS 11.41.410 and AS 11.41.420, respectively.

At sentencing, Ranstead requested that his sentence be mitigated below the applicable presumptive range of 5 to 15 years, arguing that his conduct was among the least serious conduct included in the definition of the offense.[4] Alternatively, Ranstead argued that he had extraordinary prospects for rehabilitation that justified a referral to the three-judge sentencing panel.[5]

The judge rejected Ranstead's characterization of his conduct and rehabilitation potential. The judge sentenced him to 14 years' incarceration with 8 years suspended, and 10 years' probation. The judge also adopted all probation conditions recommended in the presentence report.

This appeal followed.

Ranstead's sentencing challenge

Ranstead first argues that the judge erred in rejecting his proposed least serious conduct mitigator. But he points to no facts that meaningfully differentiate him from a typical offender who engages in sexual penetration of an incapacitated or unconscious victim. Ranstead entered the room where S.G. was sleeping; realizing she was too incapacitated to consent to any form of sex, he removed S.G.'s clothes. By his own admission, he then performed two separate types of sexual penetration. And this assault seriously impacted S.G. At sentencing she stated that she had sought psychiatric care for anxiety arising from the assault and had been diagnosed with post-traumatic stress disorder. We conclude that the judge was not clearly mistaken in rejecting Ranstead's proposed mitigator.[6]

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[4] AS 12.55.155(d)(9).

[5] *See* AS 12.55.165.

[6] *See McClain v. State*, 519 P.2d 811, 811 (Alaska 1974).

Ranstead also argues that the judge erred in refusing to refer his case to the three-judge sentencing panel. A sentencing judge has the authority to refer a case to the three-judge panel if a defendant proves by clear and convincing evidence that "manifest injustice" would result from a failure to consider a defendant's extraordinary potential for rehabilitation.[7]

But as this Court has explained, a defendant seeking to establish this non-statutory mitigator is "required to do more than show that his prospects for rehabilitation were above average for a sexual offender."[8] Here, Ranstead submitted evidence that his prospects for rehabilitation were "hopeful" and that he had a low risk for recidivism if he remained sober. But he had a significant history of alcohol abuse dating from his early twenties, and he was convicted of driving under the influence in 2001 and 2004. The judge's conclusion that Ranstead's rehabilitation hinged on his success in maintaining sobriety — an uncertain prospect — is not clearly erroneous.

We also note that, during his pre-arrest interview with the police, Ranstead initially claimed that S.G. engaged in consensual sex with him. And during his interview with Dr. Smith he did not accept full responsibility for his crime, stating that S.G. somehow led him on.

Given Ranstead's alcohol addiction and his failure to accept sole responsibility for his crimes, the superior court could reasonably conclude that Ranstead lacked an extraordinary potential for rehabilitation justifying a referral to the three-judge sentencing panel. We thus find no error in the judge's denial of Ranstead's request for referral.

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[7] AS 12.55.165; *Knipe v. State*, 305 P.3d 359, 363 (Alaska App. 2013).

[8] *Boerma v. State*, 843 P.2d 1246, 1248 (Alaska App. 1992).

Finally, Ranstead challenges his sentence as excessive. As a first felony offender convicted of second-degree sexual assault, Ranstead was subject to a presumptive sentencing range of 5 to 15 years.[9] After hearing arguments from both parties, the judge imposed 14 years' incarceration with 8 years suspended (6 years to serve), and 10 years' probation. As noted above, Ranstead faced a presumptive range of 5 to 15 years. The judge imposed a sentence within that range: 14 years with 8 suspended.

Two principles are particularly relevant to a relatively lenient amount of time to serve coupled with a significant amount of suspended time. First, although we have noted that suspended time is not "a nugatory or insignificant sanction,"[10] we have also explained that "it would be unrealistic to consider suspended time as the equivalent of time to be served in prison."[11] In other words, "suspended time is a less important consideration than non-suspended time."[12] And, second, a suspended sentence serves a distinct purpose by providing a defendant with a powerful incentive to abide by the conditions of probation, while protecting society should a defendant's effort at rehabilitation prove unsuccessful.[13]

During Ranstead's sentencing hearing, the judge discussed each of the *Chaney* factors. He concluded that Ranstead's potential for rehabilitation was

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[9] AS 12.55.125(i)(3)(A).

[10] *See Leuch v. State*, 633 P.2d 1006, 1010 (Alaska 1981).

[11] *Jimmy v. State*, 689 P.2d 504, 505 (Alaska App. 1984).

[12] *Karr v. State*, 686 P.2d 1192, 1194 (Alaska 1984); *see also Smith v. State*, 349 P.3d 1087, 1092 (Alaska App. 2015) (noting that "suspended time is weighed less heavily than active jail time" because, in part, a defendant "may never serve any of this time, or he may serve only a small portion of it").

[13] *See Heavyrunner v. State*, 172 P.3d 819, 821 (Alaska App. 2007).

"moderate" because — as noted by both the presentence report author and Dr. Smith — Ranstead's success in treatment would depend largely on his continued abstinence from alcohol. The judge found a "high to moderate" need to isolate Ranstead from the public, and he placed significant weight on the goals of individual and general deterrence. Finally, the judge acknowledged a profound need for community condemnation regarding opportunistic sexual assaults.

Accordingly, the judge imposed a sentence of 6 years to serve — a sentence toward the low end of the presumptive range — with another 8 years suspended. The judge concluded that a term of active imprisonment toward the low end of the presumptive range, combined with a significant period of suspended time to help ensure Ranstead's successful post-incarceration treatment, represented an appropriate sanction. We conclude that the sentence is not clearly mistaken.[14]

Ranstead's challenges to his conditions of probation

Ranstead challenges several conditions of his probation, arguing that they are unconstitutionally overbroad, vague, or unrelated to his offense. Conditions of probation must be "reasonably related to the rehabilitation of the offender and the protection of the public and must not be unduly restrictive of liberty."[15] Conditions that restrict constitutional rights are subject to special scrutiny: before imposing such conditions, a sentencing judge must affirmatively consider and have good reason for rejecting less-restrictive alternatives.[16]

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[14] *See McClain v. State*, 519 P.2d 811, 813 (Alaska 1974).

[15] *Roman v. State*, 570 P.2d 1235, 1240 (Alaska 1977).

[16] *Peratrovich v. State*, 903 P.2d 1071, 1079 (Alaska App. 1995).

We recently held in *Beasley v. State* that "a judge must affirmatively review the State's proposed probation conditions [to ensure that they are both appropriate and constitutionally permissible]. A judge may not delegate this responsibility to the presentence report author, even if the defense does not object[.]"[17] In Ranstead's case, the superior court adopted all of the conditions of probation recommended in the presentence report, without subjecting them to the required critical review. We recognize that Ranstead's sentencing occurred before we issued our recent decision in *Beasley* explaining the trial court's duty to independently and affirmatively review each proposed probation requirement.

For the reasons explained below, we affirm one of Ranstead's probation conditions, vacate several of the probation requirements, and direct the superior court to reconsider the remaining conditions.

Requirement to abide by any special instructions given by probation officers

General Condition No. 12 requires Ranstead to comply with "any special instructions given by the court or any of its duly authorized officers, including probation officers of the Department of Corrections." Ranstead challenges this condition, arguing that the condition is vague. But as this Court has held, this argument "ignores the implicit limitations on a probation officer's authority in other provisions of law."[18] Probation officers' instructions must be confined to implementing the court's probation conditions,[19] and Ranstead has "the right to seek court review of any special instruction

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[17] *Beasley v. State*, 364 P.3d 1130, 1133 (Alaska App. 2015).

[18] *Phillips v. State*, 211 P.3d 1148, 1153 (Alaska App. 2009); *see also Marunich v. State*, 151 P.3d 510, 520 (Alaska App. 2006).

[19] *Dayton v. State*, 120 P.3d 1073, 1084 (Alaska App. 2005).

from a probation officer that he believes abridges his rights or exceeds the authority of the Department of Corrections."[20] We therefore affirm this condition.

Participation in a domestic violence batterer's intervention program or a residential treatment program

Ranstead challenges Special Condition No. 5, which requires him to participate in domestic violence treatment if ordered to do so by his probation officer. The judge concluded this condition was appropriate because Ranstead's crime occurred within a house and was perpetrated on a victim who felt safe there. But as Ranstead points out, he did not commit a crime of domestic violence, and neither his presentence report nor Dr. Smith's report notes any history of domestic violence. The record does not support a conclusion that this condition is reasonably related either to Ranstead's rehabilitation or to the protection of the public, merely because the crime occurred in a house. We accordingly vacate this requirement.

Special Condition No. 5 also orders Ranstead to reside, at a program assessor's discretion, in a residential mental health or substance abuse treatment facility for an unspecified duration. The judge imposed no upper time limit on Ranstead's residency in such a facility. While this type of probation condition is authorized by AS 12.55.100(a)(6), AS 12.55.100(c) requires the sentencing court to specify the maximum permitted duration of the inpatient program. Because the court did not do so, the sentence is to that extent illegal.

In *Christensen v. State* we held on analogous facts that the offending condition of probation — one also failing to set a maximum duration for residential treatment — must be vacated rather than reformed:

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[20] *Id.*; *see also Phillips*, 211 P.3d at 1153; *see also Marunich*, 151 P.3d at 522.

> Our previous cases have established the principle that an illegal sentence should not be increased unless absolutely necessary to correct the illegality. Under the circumstances of Christensen's case, this principle militates in favor of curing the flaw, not by making the condition of probation more onerous, but by striking the flawed portion of that condition (here, the requirement of residential treatment).[21]

In *Christensen* we noted that a *post hoc* imposition of an upper duration of residency might be permissible if the inpatient program was demonstrably an essential aspect of the court's sentence.[22] But we have reviewed the trial court's sentencing remarks and cannot conclude that the judge viewed the theoretical possibility of inpatient treatment to be essential. Accordingly, we vacate the requirement concerning inpatient or residential treatment.

The prohibition against contact with minors

Ranstead also challenges Special Conditions Nos. 8, 9, 19, 21, and 24, which limit his contact with minors. Among other things, Ranstead is prohibited from having one-on-one contact with minors, entering or residing near places frequented by children, or working where minors may be present. The judge concluded that these conditions were appropriate because S.G. was significantly younger than Ranstead (Ranstead was thirty-four, S.G. twenty-one) and because Ranstead allegedly had "immature relationships with young adults."

We find that these requirements are unrelated to the facts of the case and unnecessarily restrict Ranstead's freedom of association. No evidence suggests that Ranstead poses a threat to minor children. Yet these conditions of probation place

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[21] *Christensen v. State*, 844 P.2d 557, 559 (Alaska App. 1993).

[22] *Id.*

stringent limitations on Ranstead's ability to obtain housing and employment after he is released.

We note the existence of substantial federal case authority regarding conditions of probation restricting a probationer's contact with minor children.[23] Even in cases involving a conviction for sexual abuse of a minor[24] or possession of child pornography,[25] these cases consistently require "an individualized assessment" of whether such a condition is appropriate for the defendant. Ranstead's case involved neither of those child-centered crimes.

We conclude that the record does not justify these conditions.[26] We accordingly vacate the probation requirements limiting Ranstead's contact with minor children.

The prohibition against possession of a computer and internet access

Special Condition No. 10 restricts not only Ranstead's possession of sexually explicit material but also his possession of any electronic device capable of

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[23] *See* Elizabeth Williams, Annotation, *Validity, Construction and Application of Conditions of Probation or Supervised Release Prohibiting Contact with Minors or Frequenting Places Where Minors Congregate - Federal Cases*, 83 A.L.R. Fed. 2d 51 (2011).

[24] *See United States v. LeCompte*, 800 F.3d 1209, 1216-17 (10th Cir. 2015); *United States v. Bender*, 566 F.3d 748, 754 (8th Cir. 2009).

[25] *See United States v. Heckman*, 592 F.3d 400, 412 (3d Cir. 2010); *United States v. Voelker*, 489 F.3d 139, 155 (3d Cir. 2007); *United States v. Duke*, 788 F.3d 392 (5th Cir. 2015).

[26] *See Bodfish v. State*, 2006 WL 829743, at *3 (Alaska App. May 29, 2006) (unpublished) (disapproving conditions limiting contact with minors under age sixteen as to a defendant convicted of having sex with an incapacitated sixteen-year-old).

storing such material without the permission of his probation officer. Read literally, this condition applies not only to computers, but also to cell phones and electronic readers. Ranstead is also forbidden by Special Condition No. 14 from opening an account with an internet provider, or from accessing the internet through anyone else's internet account. These probation restrictions proscribe such features of modern life as email, electronic filing of taxes, online college courses, or even access to appliance repair advice via YouTube.

We approved such a limitation on internet access in *Diorec v. State*, a case where the defendant created an online profile as a sixteen-year-old boy to contact his stepdaughter and her friends; he was found to have surreptitiously filmed his stepdaughter in her bedroom with a spy camera and a video transmitter and to have downloaded adult and child pornography onto his computer.[27] Thus there was a demonstrable nexus between Diorec's computer usage, his crime, and his rehabilitation.

That nexus is absent here. The judge made no finding that a ban on possession of a computer or access to the internet had any relation to Ranstead's crime, or that these conditions were necessary for his rehabilitation. Because the record is totally devoid of any articulable relationship between Ranstead's crime, his rehabilitation, and his access to electronic equipment and the internet, we vacate these restrictions.

The prohibition against sexually explicit material

Ranstead also challenges Special Conditions Nos. 10, 13, 15, and 19, which prohibit him from possessing sexually explicit material and require him to submit to searches for such material.

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[27] *Diorec v. State*, 295 P.3d 409, 418 (Alaska App. 2013).

In *Diorec v. State*, the sentencing court imposed a condition prohibiting a defendant who had surreptitiously filmed his stepdaughter in her bedroom and possessed adult and child pornography on his computer from possessing sexually explicit material.[28] We agreed that some limitation of this nature was appropriate under the circumstances but held that the phrase "sexually explicit material" provided insufficient notice of what conduct was prohibited.[29] Because such a broad formulation may infringe on First Amendment rights, we remanded with instructions to the court to narrow and justify the restriction on material the defendant was permitted to possess.[30] And in *Smith v. State*, a case involving possession of child pornography, we again held that the sentencing court must apply special scrutiny to a condition of probation limiting access to material accorded First Amendment protection to ensure that the limitation was no broader than necessary, and that the defendant was on clear notice of what material was prohibited under the condition.[31]

In *United States v. Voelker*, a case involving possession of child pornography, the sentencing court imposed a ban on sexually explicit material.[32] Voelker argued on appeal that the ban was insufficiently related to his rehabilitation or the protection of the public.[33] The appellate court vacated the condition, finding that nothing in the record established a nexus between sexually explicit material not

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[28] *Id.* at 416-18.

[29] *Id.* at 416-17.

[30] *Id.*

[31] *Smith v. State*, 349 P.3d 1087, 1094 (Alaska App. 2015).

[32] *United States v. Voelker*, 489 F.3d 139, 150 (3d Cir. 2007).

[33] *Id.*

involving children and the goals of supervised release.[34] Accordingly, when balanced against the "serious First Amendment concerns endemic in such a restriction," the ban could not stand.[35]

Here the record is silent as to why these conditions were imposed on Ranstead, whether the judge considered narrowing the conditions, and what the conditions mean. Nothing in the record suggests that Ranstead's reading or viewing habits had any particular relationship to his offense.

In both *Diorec* and *Smith*, we remanded the challenged condition for narrowing and more precise definition. But unlike those cases, Ranstead's case is devoid of any causal nexus or relationship between the challenged conditions and his crime, his rehabilitation, or protection of the public. Due to this lack of a nexus, we vacate the requirements concerning sexually explicit material.

Material that acts as a stimulus for an "abusive cycle"

Ranstead finally challenges Special Condition No. 11, which prohibits him from possessing undefined "material" that stimulates an undefined "abusive cycle." This provision, in context, appears to be a sex offender condition. But when the court overruled Ranstead's objection, it interpreted the provision as a *substance abuse* condition:

> The defendant's eighth objection is the prohibition of stimuli that may cause the abuse cycle. The record documents the serious role alcohol has played in the defendant's past and the necessity of maintaining sobriety. Eliminating ... stimuli that may cause abuse is appropriate and this objection is denied.

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[34] *Id.* at 151.

[35] *Id.*; *see also United States v. Martinez-Torres*, 795 F.3d 1233, 1240 (10th Cir. 2015) (citing federal circuit court opinions critical of blanket bans on sexually explicit material).

Given that other conditions prohibit Ranstead from consuming alcohol and from entering bars, we cannot discern what this condition demands of Ranstead. In *Smith v. State* we vacated a similar condition for failure to identify the particular types of materials that acted as a "stimulus" to the defendant's criminality.[36] We accordingly vacate this provision and remand it for the superior court to determine whether it is justified by the record and if so to explicitly define its requirements.

Other considerations for the trial court

Because we are vacating the remaining conditions of probation and remanding them for further proceedings by the trial court, we point to some that will require special attention on remand.

Special Condition No. 12 confers authority on the probation officer to restrict Ranstead's use of a vehicle — a condition that could preclude some forms of employment, and that could restrict his freedom of movement. Because the record does not appear to justify a restriction on Ranstead's automotive use, the court should reconsider whether Ranstead should be subject to this significant restriction of liberty.[37]

Special Condition No. 26 requires Ranstead to "inform all persons with whom he has a significant relationship, or with whom he is closely affiliated, of [his] sex offending history." On remand, the superior court should reconsider this condition and clarify its terms to provide constitutionally adequate notice of their meaning.[38]

Special Condition No. 3 requires Ranstead to undergo a plethysmograph assessment upon request of his probation officer. Courts have held that this procedure

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[36] *Smith*, 349 P.3d at 1095.

[37] *See id.*

[38] *Id.*

is sufficiently intrusive and demeaning as to implicate a liberty interest and to require special scrutiny.[39] Before the superior court can reimpose this requirement on remand, the court must apply this heightened level of scrutiny.

We also note that although the judge struck two disputed assertions from Ranstead's presentence report, these assertions are still legible. Alaska Criminal Rule 32.1(f)(5) requires a sentencing judge to fully black out or otherwise remove such assertions so that they are no longer a legible part of the report.[40] On remand, the superior court should ensure that alterations to the presentence report comply with this rule.

On remand, we direct the sentencing judge to reconsider Ranstead's probation conditions to determine whether they pose undue restrictions. This affirmative obligation inures to each condition, not just those conditions explicitly challenged by Ranstead.

Conclusion

Ranstead's sentence of imprisonment is AFFIRMED. We AFFIRM General Condition No. 12, but we VACATE several requirements in the special conditions as discussed above. The remaining probation conditions are VACATED and REMANDED to the superior court for further proceedings consistent with this opinion, to be held within sixty days. If Ranstead then objects to any imposed condition, he may file a supplemental brief within thirty days of the judge's order amending the conditions

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[39] *United States v. Weber*, 451 F.3d 552, 568-69 (9th Cir. 2006); *see also id.* at 571 (Noonan, J., concurring) ("There is a line at which the government must stop.").

[40] *See Packard v. State*, 2014 WL 2526118, at *5 (Alaska App. May 21, 2014) (unpublished).

of probation, and the State may respond thirty days thereafter. We retain jurisdiction of this case.